Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KARL L. DAHLSTROM,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

KARL L. DAHLSTROM
Reg. No. 12894-054
P. O. Box 1500 – Unit F
El Reno, Oklahoma 73036

Petitioner Pro Se

QP

QUESTIONS PRESENTED FOR REVIEW

1) Are the Petitioner's Motions to Dismiss under F.R.Crim.P. 12(b)(2) authorized with a jurisdictional basis within one (1) year after direct appeal.

2) Is the Petitioner's Grand Jury Indictment sufficient when the legal and fact elements of unlawful, materiality and others are totally missing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karl L. Dahlstrom petitions for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decisions of the Court of Appeals for the Fifth Circuit are reproduced in the attached Appendix "A" and "B".

JURISDICTION OF THIS COURT

The judgments of the Court of Appeals were filed on November 23, 2001 and January 3, 2002. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the Fifth and Sixth Amendments of the U.S. Constitution.

STATEMENT OF THE CASE

Petitioner Karl L. Dahlstrom was charged with various crimes relating to the selling of stock in a private corporation to investors and using the funds in the

research, development, manufacture, marketing and testing of a fire fighting gel operating in College Station, Texas. He was convicted of securities fraud, registration and broker-dealer violation and mail fraud under 15 U.S.C. §78j(b), 15 U.S.C. §77q(a), 15 U.S.C. §77e(a), 15 U.S.C §78o(a)(1) and 18 U.S.C. §1341.

Petitioner filed a §2255 Motion and F.R.Crim.P. 12(b)(2) Motions which were consolidated for the government's response. The District Court denied all the Motions and appellant filed a Notice of Appeal for the 12(b)(2) Motions *only*. Appellant filed his Opening Brief and a three (3) judge panel summarily dismissed his appeal.

Appellant filed a Petition for a Hearing En Banc because of conflict of decisions between the U.S. Supreme Court and other Fifth Circuit decisions with the panel opinion which was denied.

Petitioner's 12(b)(2) Motions allege that his grand jury indictment has essential legal and facts elements missing that cause the Court to lack subject-matter jurisdiction which causes any subsequent judgments to be void. These several essential legal and fact elements are listed and outlined in Appellant's Opening Brief which was filed with the Appellate Court. The Petitioner in this case is not challenging the constitutionality of his conviction or sentence by this action, only that the Court does not have jurisdiction, therefore any and all judgments are void.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS AT THE HEART OF WHEN 12(b)(2) MOTIONS ARE APPROPRIATE AND WHAT LEGAL AND FACT ELEMENTS MUST BE INCLUDED IN A GRAND JURY INDICTMENT.

There can be little debate that several of the various Appellate Courts of the United States have ruled in favor of the Petitioner in similar cases, even recent Fifth Circuit cases. The U.S. Supreme Court has agreed with these several Appellate Court decisions. Thus, there is great inconsistency between other Fifth Circuit cases along with other Circuits and the panel in this case concerning these important issues, meaning that a citizen's rights vary greatly depending on where they find themselves as to geographical location and venue.

Firstly, the panel and en banc Court panel erred in ruling that the 12(b)(2) Motions appeared to be unauthorized and without a jurisdictional basis and cited *U.S. v. Early*, 27 F.3d 140, 142 (5th Cir. 1994). *Early*, supra, was under 18 U.S.C. §3742(a) as the basis for relief which does *not* challenge the jurisdiction of the court making it time barred. The *Early*, supra, case is not on point.

Appellant's 12(b)(2) Motions challenge the jurisdiction of the Court by arguing that the grand jury indictment did not charge a federal criminal offense causing the Court to lack subject-matter jurisdiction. A jurisdictional challenge under 12(b)(2) can be made at any time, even after direct appeal proceedings. The U.S. Supreme Court in *Hughes v. Thompson*, 415 U.S. 1301, 94 S.Ct. 829,

39 L.Ed. 2d 93 at 94 (1974) stated that, "under the Federal Rules of Criminal Procedure the question of the sufficiency of the indictment *shall be noticed by the court at any time*. Rule 12(b)(2)."

In *U.S. v. Armstrong*, 951 F.2d 626 at 628 (5th Cir. 1992), Cert. Denied 40 L.Ed. 2d 824, the Court ruled that a jurisdictional claim involving an indictment can be brought up under a §2255 motion. Appellant in this case filed the 12(b)(2) motion within one (1) year of direct appeal denial. In *U.S. v. White*, 258 F.3d 374 (5th Cir. 2001), the Court ruled that a challenge to indictment's failure to charge an offense was not waived by failure to raise the argument in initial appellate brief. Several other Fifth Circuit decisions also establish the principle that because a challenge to an indictment for failure to charge a federal criminal offense is jurisdictional, an objection may be raised *at any time*. *U.S. v. Guzman-Ocampo*, 236 F.3d 233 (5th Cir. 2000); *U.S. v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999); *U.S. v. Fitzgerald*, 89 F.3d 218 (5th Cir. 1996); *U.S. v. Campos-Ascencio*, 822 F.2d 506 (5th Cir. 1987); *U.S. v. Oberski*, 734 F.2d 1034 (5th Cir. 1984), cert. denied, 83 L.Ed. 2d 790. In *Oberski*, supra, the Court specifically stated that "pendency of the proceeding" could be after the direct appeal. Therefore, it would be unfair and unjust to consider appellant's motions as unauthorized and without a jurisdictional basis in lieu of opposite legal precedents in the U.S. Supreme Court and this 5th Circuit.

Secondly, the panel also erred in ruling that appellant's indictment was sufficient because it *alleged all the material elements* of the offenses and *provided Dahlstrom with adequate notice* of the charges being made against

him. The panel cites *U.S. v. Berrios-Centeno*, 250 F.3d 294 at 297 (5th Cir. 2001) as the basis for their reasoning. Again, the *Berrios-Centeno*, supra, case is off point because Title 8 U.S.C. §1326 in that case is a *General Intent Offense*, not a *Specific Intent Offense. All of the statutes in appellant's indictment are Specific Intent Offenses* and should be appraised with a different standard and context. Public welfare specific intent offenses are created and recognized in limited circumstances. *Berrios-Centeno*, supra at 298. Apparently, the offenses in Appellant's indictment were not public welfare offenses or, if they were, Congress chose to make them "specific intent offenses".

All of offense statutes in appellant's indictment required the essential element of "unlawful" or "unlawfully". If these offense statutes were "general intent", this element is still required. But, the statutes are "specific intent" offenses where congress included the term "unlawful" or "unlawfully" in the statute as an essential element. The case cited by the panel explains the difference between "general intent" and "specific intent" and shows the error in the panel's reasoning. *Berrios-Centeno*, supra at 299. In *Berrios-Centeno* at 299, the court explained "general intent" as a situation where a defendant may not "specifically intend" to act *unlawfully*, but he did "intend" to commit the act. Conversely, in a "specific intent" crime, a defendant must "specifically intend" to act *"unlawfully"*. This essential element of *"acting unlawfully"* is totally missing in all counts in appellant's indictment even though it was required. Therefore, it follows that all of the material elements of the offenses were not present and Dahlstrom did *not* receive adequate notice of the charges against him as to "mens rea".

Also, the panel's decision and understanding of their own cited case seems to be faulted. Again in *Berrios-Centeno*, supra, p. 297, this case cites *Morrisette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) which established the essential "mens rea" elements of a "specific intent offense" crime to be knowingly, willfully and "*unlawfully*". (emphasis added). The court in *Berrios-Centeno*, at 287, stated, "By any standards, the "mens rea" element is "material" or "essential". Yet the panel erroneously asserts that the indictment of the appellant is sufficient and all the material elements are present. Even if the "specific intent" statutes were silent in appellant's case (and they are not!), those necessary elements are still required. *Berrios-Centeno*, supra, p. 297, note 3.

Another example of a missing essential fact element occurs in Securities Counts 2 through 5 in appellants indictment. The names of any alleged victims or persons involved in stock transactions are totally missing in Counts 2 through 5. It is an elementary principle of criminal pleading that the indictment must state the species – it must descend to the particular. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962) at 251; *U.S. v. Diecidue*, 603 F.2d 535 (5th Cir. 1978); *U.S. v. Williams*, 679 F.2d 504 at 509 (5th Cir. 1982). The phrase "shareholders" in appellant's indictment does not descend to the particulars. Apparently, the panel used the specific names in the mail fraud counts to incorporate them in the Securities Counts. This is not allowed because each count in an indictment must be regarded as if it were a separate indictment. *Dunn v. U.S.*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932). Each count is separate without reference to other counts unless the allegations of

those counts are expressly incorporated. *Goldenberg v. U.S.*, 75 L. Ed. 2d 479 (1983). In appellant's indictment, the mail fraud counts were not incorporated into the securities counts 1 thru 5. Thus, the specific names cannot be used as essential fact elements in counts 1 thru 5.

Several other examples of missing essential legal and fact elements are missing from appellant's indictment, e.g. materiality in Counts 2, 3 and mail fraud counts. (See Appellant's Opening Brief.) This shows that the indictment was not sufficient in all the material elements in this case.

The panel decided that Dahlstrom was provided with adequate notice of the charges being made against him. If Dahlstrom had missing essential legal and facts elements in the indictment, it follows that neither the grand jury nor Dahlstrom could have had adequate notice. Also, actual notice prior to trial does not cure the insufficiency of the indictment which failed to contain any part of one element of offense. *U.S. v. Hooker*, 841 F.2d 1225 (4th Cir.); *U.S. v. Spinner*, 180 F.3d 514 (3rd Cir. 1999). Also, *Berrios-Centeno*, supra, at 297 states that, "the grand jury must be notified (informed) of the basis for the charge" under the Fifth Amendment. This is true even if the defendant is informed. In addition, a valid indictment must:

1.) confirm the elements of the offense charged,

2.) fairly inform a defendant of the charge, *and*

3.) every essential element of an offense must be charged in the body of the indictment, even a reference to the statute will not cure the failure. *U.S. v. Vinyard*, 266 F.3d 320 (4th

Cir. 2000) A finding that a defendant is fairly informed of the charge will not make the indictment valid because that is only one leg of a three (3) legged stool.

CONCLUSION

It is obvious that the panel decision conflicts with several U.S. Supreme Court, 5th Circuit and other Circuit Court decisions. This conflict must be corrected by the U.S. Supreme Court. The *Early*, supra case, and *Berrios-Centeno*, supra cases are not legally authorized to be used as an argument for dismissal under any logical construction in this case, as applied by the panel and en banc hearing panel.

THEREFORE, IT IS prayed that all Counts be dismissed with prejudice for failure of indictment to charge any criminal offenses, or in the alternative, this Court remand the case back to 5th Circuit with instructions to review fully the appeal by a different panel.

Respectfully submitted,

KARL L. DAHLSTROM – pro se
Reg. No. 12894-054
P.O. Box 1500 – Unit F
El Reno, OK 73036

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20571
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KARL L. DAHLSTROM,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-00-CV-3108
H-96-CR-157-1

(Filed Nov. 23, 2001)

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:*

Karl L. Dahlstrom, federal prisoner # 12894-054, appeals the district court's dismissal of his motions invoking Fed. R. Crim. P. 12(b)(2), which were filed after

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

his conviction was affirmed on appeal and after the denial of certiorari. Because the criminal proceedings were no longer pending, these motions appear unauthorized and without a jurisdictional basis. *See United States v. Early*, 27 F.3d 140, 142 (5th Cir. 1994).

Even assuming that these motions were validly filed, a review of the indictment reflects that it was sufficient because it alleged all the material elements of the offenses and provided Dahlstrom with adequate notice of the charges being made against him. *See United States v. Berrior-Centeno*, 250 F.3d 294, 297 (5th Cir.), *cert. denied*, 70 U.S.L.W. (U.S. Oct. 1, 2001) (No. 01-5535), 2001 WL 914944.

Accordingly, the appeal is DISMISSED as frivolous. *See* 5th Cir. R. 42.2. All outstanding motions are DENIED as MOOT.

APPEAL DISMISSED. ALL OUTSTANDING MOTIONS DENIED AS MOOT.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20571

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KARL L DAHLSTROM,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 11/23/01, 5 Cir., ___, ___ F.3d ___)

(Filed Jan. 3, 2002)

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge